United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1057

B
Pfs

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1057

UNITED STATES OF AMERICA,
Appellee,

—v.—

SIDNEY R. LUBLIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1057

UNITED STATES OF AMERICA,

Appellee,

—v.—

SIDNEY R. LUBLIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Sidney R. Lublin appeals from a judgment of conviction entered on October 9, 1975 after a four-day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 75 Cr. 744, filed on July 28, 1975 in four counts, charged Lublin, a postal employee, with the theft of four articles from the mails, in violation of Title 18, United States Code, Section 1708. Count One charged that on October 24, 1974 Lublin had stolen a parcel from the New York General Post Office. The remaining counts charged thefts of the following articles from the Claims and Inquiry Section of the New York General Post Office, all of which occurred on March 26, 1975: a bottle of perfume (Count Two), a car stereo tape deck (Count Three), and a book (Count Four).

Trial commenced on October 6, 1975 and ended on October 9, 1975 when the jury found Lublin guilty on

Count Four and not guilty on Counts One through Three. On November 20, 1975, Judge Conner suspended the imposition of sentence on Count Four, pursuant to Title 18, United States Code, Section 3651, and placed defendant on unsupervised probation for a period of three years.

Statement of Facts

Government's Case

The thefts charged in Indictment 75 Cr. 744 occurred in the vicinity of the Claims and Inquiry Section ("C & I"), which was then located on the fourth floor of the New York General Post Office. John R. Laning, foreman of Appraisal and Sales at the General Post Office, testified that C & I is comprised of subdivisions handling such matters as dead letters and parcels; unaddressed mail; domestic, international, and foreign claims; and articles found loose in the mails (Tr. 27-29).* Dead, unaddressed, and refused parcels and parcels on which the Postal Service has paid claims to the senders are sent to the auction section where they are segregated into lots and auctioned periodically. The General Post Office, a regional clearing-house, receives over 200,000 articles for auction each year from other post offices in New York, New Jersey, Pennsylvania, Maryland and Delaware (Tr. 30-31). During the period here at issue, C & I was open from 7:15 A.M. to 5:00 P.M. (Tr. 31). Articles destined for C & I which arrived after hours were customarily left in the passageway outside, to be processed the following morning (Tr. 31).

---

*References to pages of the trial transcript and to Government Exhibits are abbreviated herein, respectively, as "Tr." and "GX".

On October 24, 1974, Postal Investigator James J. McCarthy prepared a test parcel addressed to C & I consisting of a Commodore multi-band solid state radio. At about 5:00 P.M. on October 24th, McCarthy placed the parcel on a skid with other mail in the corridor outside C & I (Tr. 60-63). He and another investigator, John R. Hedlund, entered a storage area adjacent to the parcel, from which position they maintained surveillance on the parcel through cracks in the plywood wall (Tr. 65). Shortly after 7:00 P.M., McCarthy and Hedlund saw Lublin (Tr. 71) pick up the test parcel, wrap it in gray fabric and walk away (Tr. 67). McCarthy and Hedlund were unable to apprehend the thief, however, because they had difficulty exiting the storage area and were unable to contact, by walkie-talkie, other investigative personnel who were waiting nearby (Tr. 68).*

Some five months later, on March 26, 1975, Lublin, who was employed by the Post Office as a locksmith, was sent to C & I pursuant to foreman Laning's request to extract a broken key which Laning had discovered in a lock (Tr. 33). McCarthy and Hedlund, who were maintaining surveillance through binoculars from the observation gallery which overlooks the area (Tr. 72, 74), saw Lublin enter the C & I section. Lublin conferred with Laning, who then departed the immediate area (Tr. 33, 34, 76), after which Lublin began walking around the section. From a desk which was part of the loose-in-the-mails unit, Lublin picked up and examined several items, finally taking a badge (GX 5) and a bottle of perfume (GX 2), which he placed in his right jacket pocket (Tr. 76). He walked to another area of the C & I section and took from an open tub

---

* This and the following portion of the statement of the Government's case is premised on the testimony of McCarthy, which was corroborated by the testimony of Investigator Hedlund.

a white styrofoam case (GX 3), which he placed under his jacket. Then he left the work area (*id.*).

A short while later, Lublin returned to the C & I work floor carrying a leather case (GX 7). McCarthy and Hedlund saw him take a book (GX 4) from an Oregon tub and place it inside the case, and then pick up a bolt-cutter (GX 6). Lublin then walked toward a doorway leading out of the section. McCarthy and Hedlund left the observation gallery and moments later approached Lublin in the corridor outside of C & I, identified themselves, and told him to come to their office. Lublin was given *Miranda* warnings on the way (Tr. 78) and again at the office (Tr. 79). He was asked about the bolt-cutter and claimed it was his and that he had left it in the C & I section on an earlier day (Tr. 85). In response to a request, he opened the leather case and removed the book. He said he had taken the book from C & I to read (*id.*). With the book removed, the leather case contained only some miscellaneous screws (Tr. 232, 311, 398).

Lublin and the postal authorities then went to Lublin's locker on the fifth floor. He opened the locker and removed a jacket, the right hand pocket of which contained a bottle of perfume (Tr. 95). On the shelf in the locker was the Transit Authority badge that earlier he had been seen taking from C & I (*id.*). The group then proceeded to the key shop area, also on the fifth floor, where a white styrofoam case was found in the bottom drawer of a filing cabinet used by Lublin (Tr. 101). The case contained a car stereo tape deck (Tr. 102).

Lublin and the others then returned to the offices of the Postal Inspection Service on the fourth floor, where Lublin was questioned about the perfume, the badge and the tape deck. He claimed that the perfume belonged

to his girlfriend, that he had found the badge on the subway, and that he had bought the tape deck, for which he could produce a bill of sale (Tr. 106).*

Defendant's Case

Lublin established through Joseph Molnar, an account technician with the payroll division of the Post Office, that according to Post Office payroll records Lublin had punched out at 3:53 P.M. on October 24, 1974 (Tr. 338).

Lublin took the stand and denied taking the package on October 24th (Tr. 352), and the styrofoam case (Tr. 355), the badge (Tr. 391-393), and perfume on March 26, 1975 (Tr. 356). He undertook to explain the presence of the styrofoam case in the file cabinet he used by stating that he shared that file cabinet with several other workers (Tr. 364) and that he had recently returned to work from 20 days in Miami (Tr. 365); he was unable to explain, however, the presence of the perfume in his jacket pocket (Tr. 366), and made no attempt to explain the presence of the badge in his personal, fifth floor locker, except to say he had never even seen it prior to his arrest (Tr. 391-393).

Lublin admitted taking the bolt-cutter, which he said had been issued to him for use in his work (Tr. 359). He admitted taking the book, which he said had been lying in a pile of rubbish on the floor (Tr. 360). He claimed that when arrested he had been carrying the book in his hand as he walked to the bathroom, intending

---

* Lublin did not then, or indeed ever, produce such a bill of sale. In fact at trial he not only categorically denied he had ever stolen the styrofoam case and tape deck from the post office, but denied that he had ever even seen them prior to his arrest (Tr. 355).

there to took at it and thereafter to return it to the C & I section (Tr. 361), and that he had related these facts to the arresting officers upon his arrest. He also claimed that at the time of his arrest his satchel had contained tools (Tr. 356) with which he had worked on the broken lock (Tr. 357). These tools, he said, had been confiscated upon his arrest (Tr. 384).

Finally, Lublin denied that he had ever made any post-arrest, exculpatory statements to the arresting agents purporting to explain his innocent acquisition and possession of the perfume, badge and tape deck (Tr. 369, 393, 383).*

ARGUMENT

POINT I

The trial court did not err in admitting the bolt-cutter into evidence.

Lublin argues that the District Court committed reversible error in admitting into evidence the bolt-cutter McCarthy had seen Lublin take from C & I moments before his arrest. The argument is meritless.

On direct examination, Investigator McCarthy testified without objection that he had seen Lublin take a bolt-cutter, which had been lying on the floor of C & I (Tr. 77), immediately after Lublin had taken the book charged in Count Four, and immediately prior to his arrest outside of C & I (Tr. 77-78). The Government

---

* In its rebuttal case, the Government called McCarthy, Hedlund and Special Investigator Joseph M. Molina, all of whom controverted Lublin's testimony that he had never made any exculpatory statements immediately after his arrest with respect to the perfume, the badge and the tape deck.

then offered the bolt-cutter into evidence and advanced three arguments for its admission: its taking was an integral part of the fact pattern of the case (Tr. 88); it corroborated McCarthy's testimony that he had seen the defendant take the tool and had recovered it from him upon his arrest (Tr. 89); and its taking was a similar act (Tr. 88). The defense objected to admission of the bolt-cutter on the ground that the indictment did not charge Lublin with its theft (Tr. 87, 88). Judge Conner found the bolt-cutter to be relevant and admissible in that it tended to show intent and filled what the jury might otherwise find to be a gap in McCarthy's testimony (Tr. 90). In admitting the tool, the court cautioned the jury that Lublin was not charged with stealing either the bolt-cutter or the badge, which was similarly admitted.* Following admission of the bolt-cutter, the Government in its examination of McCarthy elicited no testimony from which the jury could infer that Lublin's taking of the bolt-cutter was unlawful or even improper. It was during defense counsel's extended cross-examination of McCarthy that testimony was elicited to the effect that the bolt-cutter had not been issued to Lublin but was assigned to C & I, where it was used to cut the locks off sea bags, steamer trunks and other secured mail sent to C & I for processing (Tr. 238-239). Although McCarthy had found no evi-

---

* The Court: I want to caution the jury that the defendant in this case has not been charged with taking the bolt-cutter which has just been introduced in evidence as Exhibit 6. That is not one of the offenses charged in the indictment. Likewise, he has not been charged with taking the badge. You have heard testimony that he took a badge and the bolt-cutter among other items. The indictment does not charge him with taking the badge or the bolt-cutter. In determining his guilt you will consider only the offenses that are charged in the indictment. In other words, you can't convict him because you found he took a bolt-cutter or because you found he took a badge because those are not the offenses for which he is on trial here. (Tr. 91.)

dence that Lublin had ever had possession of the bolt-cutter (GX 6) before March 26, 1975, he was unable to testify that Lublin never used bolt-cutters in his work (Tr. 239). In summation, the prosecutor argued that Lublin's claim that he had borrowed the book to read in the bathroom with the intention of returning it was implausible because, *inter alia*, he had been carrying the bolt-cutter when arrested (Tr. 181). If Lublin in fact intended to return the book to C & I after looking at it in the bathroom it was unlikely that he would carry the two-foot bolt-cutter with him rather than leaving it in C & I to await his return. The prosecutor also mentioned McCarthy's testimony on cross-examination that Lublin was not entitled to take the bolt-cutter from C & I, while making it clear that theft of the bolt-cutter was not charged in the indictment (Tr. 480). Even had the defendant's objection to receipt of the bolt-cutter into evidence been sustained, these arguments would nevertheless have been proper since McCarthy had testified to the underlying facts.*

Lublin's claim that the bolt-cutter was improperly admitted must be evaluated in terms of Article IV of the Federal Rules of Evidence. Article IV of the Rules defines "relevant evidence" as evidence tending to make the existence of a pertinent fact more, or less, probable (Rule 401), and provides that all relevant evidence is admissible (Rule 402), unless its probative value is "substantially outweighed" by the danger of unfair prejudice or confusion of the issues (Rule 403). The Rules in this regard are harmonious with and essentially codify prior

---

* Since the defense did not object to testimony about the taking of the bolt-cutter, Lublin cannot, and does not, argue now that the admission at that testimony was error requiring reversal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). His claim is limited perforce to admission of the object itself.

decisional law. *E.g., United States* v. *Wiener*, Dkt. No. 75-1218 (2d Cir. March 24, 1976), slip op. 2753, 2757; *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States* v. *Fisher*, 455 F.2d 1101, 1103 (2d Cir. 1972); *United States* v. *Ravich*, 421 F.2d 1196, 1204 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *see also* 4 Wigmore, Evidence § 1151 p. 325 (Chadbourne rev. 1972).

Application of the foregoing principles to the facts of this case makes it clear that admission of the bolt-cutter was entirely proper. The taking of the bolt-cutter, whether criminal or not, was of probative value as "an inseparable part of the whole deed." 1 Wigmore, Evidence § 218 p. 719 (3rd ed. 1940); *Rubenstein* v. *United States*, 151 F.2d 915 (2d Cir.), *cert denied*, 326 U.S. 766 (1945). Lublin carried the bolt-cutter in one hand as he left C & I (Tr. 91). He was carrying it when arrested seconds later (Tr. 307). In view of his claim upon arrest that he had borrowed the book to read in the bathroom (Tr. 311) and his explanation at trial that he intended to return it (Tr. 361), it was entirely proper for the court to permit the Government to introduce the bolt-cutter—a heavy article about two feet in length—so that the jury could examine it. The applicable evidentiary principles cannot properly be construed to require that the jury be presented with a misleadingly incomplete version of the facts leading to a defendant's arrest.

Moreover, the bolt-cutter was of probative value in corroborating McCarthy's testimony about its being taken, and was admissible as evidence of a similar act probative of Lublin's intent to steal the book in issue. *E.g., United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).*

---

* The rationale of *United States* v. *DeCiccio*, 435 F.2d 478 (2d Cir. 1970), mistakenly relied on by Lublin, suports admission of the evidence challenged herein. As *DeCiccio* held,

[Footnote continued on following page]

Not only did the bolt-cutter constitute evidence having undoubted probative value, its potential for causing unfair prejudice to Lublin was slight at best. Unlike weapons, *cf. United States* v. *Wiener*, *supra*, large sums of cash, *cf. United States* v. *Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), or the proverbial bloody shirt, the bolt-cutter was a simple tool wholly lacking in any inherent overtones of criminality. In view of Lublin's occupation and the nature of the tool involved, this piece of tangible evidence was in and of itself the least incriminating of all those offered by the Government.*

In sum, it cannot be seriously contended that the jury in this case, having acquitted Lublin on Counts One, Two and Three, found him guilty on Count Four

---

"The rule which despite the general rule, authorizes the admission into evidence of prior crimes similar in nature to the crime sought to be proved at trial authorizes it in order to prior knowledge, intent, or design. Therefore the evidence is compensatingly probative if the element of intent, etc. is placed in issue in the case at trial. . ."

435 F.2d at 483. Since Lublin's defense on Count Four was lack of criminal intent, admission of the bolt-cutter was entirely proper.

The one other case Lublin cites, *Williams* v. *United States*, 168 U.S. 382 (1897), involved admission of bank balances of $5,000 to prove that the defendant had extorted $185, combined with an instruction in the court's charge that the jury could draw unfavorable inferences against the defendant from his failure to explain the source of his assets. *Williams* is clearly inapposite.

* A review of the jury deliberations completely refutes any notion that Lublin was unfairly prejudiced by admission of the bolt-cutter. The bolt-cutter was not mentioned in any of the jury's notes, nor did the jury ask that the tool be sent to the jury room. On the contrary, the jury's notes reflect an intelligent, proper and conscientious focus on the central issues raised by the evidence on Count Four—the legal definitions of theft (Tr. 544) and of intent with respect thereto (Tr. 550-551).

because, while not persuaded of his guilt in the taking of the book, it was outraged that he had taken a bolt-cutter found on the floor in C & I. Judge Conner was entirely correct in admitting the bolt-cutter into evidence.

POINT II

There was more than ample evidence to sustain the jury's finding of guilt on Count Four.

Lublin contends further that the evidence was insufficient to sustain his conviction on Count Four. The contention is frivolous.

The Government proved, and Lublin acknowledged, that on March 26, 1975 he removed the book in issue from the C & I section of the General Post Office. The only disputed issue with respect to Count Four was whether in taking the book Lublin intended to steal it.* That issue of intent was preeminently a question of fact for the jury, *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). In determining the same the jury was required to choose betwen conflicting the testimony of what had occurred adduced by the Government and Lublin.

That testimony differed on such points as whether or not Lublin returned to C & I with an empty satchel,

---

* There was substantial evidence to support the jury's finding that the other elements of Count Four had been established. Laning's uncontested testimony concerning the routine practices of C & I (Tr. 29-30), *see* Federal Rules of Evidence, Rule 406, and McCarthy's testimony that Lublin took the book from an Oregon tub in C & I (Tr. 77), permitted findings that the book was mail matter within the scope of Section 1708, *cf. United States* v. *Grant*, 494 F.2d 120, 123 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974), and was taken from an authorized depository, *cf. Goode* v. *United States*, 159 U.S. 663, 672 (1895).

whether or not he had worked on the broken key which had led initially to his being sent to C & I, the location of the book when he took it, and the manner in which he carried it from C & I.

Government witnesses McCarthy and Hedlund testified, for example, that when Lublin returned to C & I with his satchel, he did not go to the door with the jammed lock; instead, he approached an Oregon tub, rummaged through it, and removed the book which he placed in his satchel. McCarthy and Hedlund found no tools in the satchel when they arrested Lublin (Tr. 232, 311). Lublin for his part testified that he had come to C & I with his tools, had worked on the lock, had picked up the book, which he spied lying in a pile of rubbish, and had carried it openly as he left C & I.

Viewing the evidence in the light most favorable to the Government, the jury could permissibly have found the following incriminating facts: that Lublin came to C & I with an empty satchel, from which the jury could infer that he intended to use the satchel to conceal articles which he might steal; that he rummaged through and took the book from the tub in which it was located, from which the jury could infer a deliberate choice of the book by Lublin as a thing of value; and that he concealed the book in the satchel, from which the jury could infer a purpose to avoid detection and an awareness of the wrongfulness of his conduct. The jury could permissibly have found that Lublin's explanation that he had borrowed the book to read in the bathroom was incredible and constituted a false exculpatory statement, thereby further evidencing Lublin's criminal intent. *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States* v. *Lacey*, 459 F.2d 86, 89 (2d Cir. 1972). The jury was not required to accept Lublin's self-serving explanation for his conduct. *Williams* v. *United States*, 273 F.2d 469 (10th Cir. 1959); *United States* v. *Texeira*, 162 F.2d 169 (2d Cir. 1947).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ALLEN R. BENTLEY,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

☆ U. S. Government Printing Office 1976— 614—350—650

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10TH day of MAY, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

GEORGE ROSENBAUM, ESQ.

51 CHAMBERS STREET

NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Allen R. Bentley

ALLEN R. BENTLEY

Sworn to before me this

10TH day of MAY, 1976

Jeanette Ann Graver

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1241275
Qualified in Kings County
Commission Expires March 30, 1977